ART. VI. — *An Act to amend the Law relating to Divorce and Matrimonial Causes.* 20 and 21 Victoria, Chapter 85.

THERE are few persons who are not, or have not been, or hope not or fear not to be married. How vast the numbers who at this moment, to use a simile borrowed from a Roman form of marriage, wear the yoke; who have, as Cœlebs, a cynic fellow, would say, been caught in the trap; married and settled in the country, as Lord Chesterfield wished the dog were that bit him; married, yet unsettled in their desires and affections, and by night and by day toiling to trace the thread that has so mystically tied them, and so perchance untie it; married by the priest, and unmarried by the magistrate; married, and secured, by the safe defence of that institution, in the possession of all that life can yield to rational expectation, — the chaste and tranquil pleasures of the fireside, and children in whose persons those pleasures are multiplied!

That the marriage contract should not be dissoluble at the will of one, or even both, of the parties to it; that no marriage contract should be recognized by law or tolerated in practice, except that which purports in terms to unite the parties for life; that the contract, so manifestly important to the parties themselves and to those afterward to come into existence, should be entered upon in the presence of witnesses, and placed upon a permanent public record; that the wedding pair should, upon making the contract, invoke the sanction of Heaven, and seek the benediction of the ministers of religion and the influence of holy associations, the sight of the altar and the shadow of consecrated walls, — society has decided to be fit, and its usages in these particulars do not require to be vindicated, nor can they be, nor ought they to be disturbed. We think, too, that the opinion is widely established, that the marriage contract is so far a mutual and dependent contract, that the violation of it by one of the parties, habitual, gross, and wilful to such a degree as to destroy the peace, or to endanger the life, health, or reason of the other, and thus or otherwise to defeat the beneficent ends for which they were united, justifies the suffering party in claiming the interposition of the

magistrate with a view to its dissolution, and that it ought to be dissolved, or at least loosened so far as to enable the sufferer to escape from the miseries which it occasions. The marriage contract, the instant it is made, creates and fixes the marital relation. But a contract or engagement to become husband and wife at a future time, whether certain or uncertain, is ineffectual to bind the parties to perform it specifically; and without something further, each is as free by law to marry any other person, as if no such mutual engagement had been made. Except the right to mourn the broken vow, and except the imperfect right to pecuniary damages, hereafter to be adverted to, the repudiated party is without relief. A space for repentance is accorded, as well by law as by the conventions of society, between the vows and their performance, as a safeguard to youth against the impulses of that season of life.

Such are substantially the modern opinions and usages which regulate the contract of marriage. But their formation has been gradual, its history somewhat curious; and a glance at its more important phases seems to promise at least some amusement, and is rather necessary in order to bring into their most impressive view the aim and effect of the recent acts of the British Parliament on the subjects of divorce and of ecclesiastical jurisdiction.

"Marriage in its origin," Lord Stowell declares, "is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world." "In civil society it becomes a civil contract, regulated and prescribed by law and endowed with civil consequences." Selden declares that it is nothing but a civil contract, and no more an ordinance of God than any other, for "God commands me to keep it when I have made it." And it is so regarded by the law of nations. It requires, by the practice of nations, no religious rite to confirm it, and, like any other contract, may be established by the testimony of those who were present when it was made; it may be proved by the written or unwritten words of the parties, or inferred from their cohabitancy. It is not necessarily a perpetual contract. The patriarchs bought their wives, and from the ceremonies of coemption and of remancipation it may reasonably be suspected that the early

Romans both bought and sold theirs. A tradition of the Jews permitted them to put away their wives without cause, and Jesus did not forbid them to do it for the cause of adultery. The three ceremonious marriages of the Romans, *Confarreation*, *Coemption*, and *Use*, though dissoluble at the will of either party by the performance of a ceremony only, were deemed too strict for the notions and habits of that people under the Empire; and had given place to a connection, in terms, at the will of either party, and dissoluble without premonition or ceremony.

These loose marital connections continued in practice after the Empire became Christian; but prior to that epoch a different idea of marriage had taken origin within the limits of that Empire, and had become established in the usage of a considerable portion of its subjects. It was derived, as to its most prominent characteristics, from the teachings of Jesus, and was regulated by the jurisdiction of the Church.

Jesus exhorted his disciples on the subject of such differences as might arise among them, after trying without effect the mild expedients becoming the relation of brethren, to appeal to the church, as a final measure; and if the offending brother should neglect to hear the church, then to "let him be as an heathen man and a publican."

The Apostle Paul, long afterward, more pointedly addressed the Christians at Corinth: "Dare any of you, having a matter against another, go to law before the unjust, and not before the saints? Do ye not know that the saints shall judge the world? And if the world shall be judged by you, are ye unworthy to judge the smaller matters? ..... If ye have judgment of things pertaining to this life, do ye set them to judge who are least esteemed in the church? I speak to your shame, Is it so that there is not a wise man among you, — not one that shall be able to judge between his brethren? but brother goeth to law with brother, and that before unbelievers?"

Whatever inference is justly to be derived from this text, as to the progress then actually made in organizing the court Christian for the adjustment of all matters secular arising among the members of the Christian Church, it is certain that before the conversion of Constantine such a jurisdiction was

firmly established by the convention of the faithful, and that the bishops, personally or through their chancellors, habitually administered justice in their consistories. Spelman declares that these courts were open every day, not excepting the Sunday itself, for the twofold reason of contempt for the superstition of the Pagans, who could not transact such business upon *dies nefasti*, and of depriving the Christian suitor of the pretence that the closing of the bishop's court, even upon one day in the seven, compelled him to resort to the heathen forum, or, in the language of the Apostle Paul, "to go to law before the unjust, and not before the saints." These courts, of course, adopted the civil law, being the law of their common country, as the most perfect justice in the adjudication of rights arising under it, and as furnishing the forms of procedure most familiar and convenient. Thus the civil law became the most bountiful nurse of the canons, which, gradually expanding with that element, and with the decrees of councils and episcopal constitutions, became a highly refined and artificial system.

The canon law, the law of the general Church of Christ, propounded an idea of the marriage tie wholly different from that which supported the various nuptial forms that have been described as used and practised by the Roman people without the Church. It asserted marriage to be a religious contract ratified by the Holy Ghost; — a sacrament, by which the two were mystically and indissolubly united in one, so that no earthly power could sever them, and even death itself could not annul the union so far as to allow the survivor to contract marriage with another. To this extreme idea of religious sanctity and indissolubleness, which derives countenance, as was supposed, from the sacred Scriptures and usages, were added many refinements borrowed from various sources. From the civilians the ecclesiastics took their highly artificial definition, "Consortium omnis vitæ, humani et divini juris communicatio," and upon it established the dogma, that marriage could not subsist between a Christian and a Heathen, in analogy with the Roman doctrine, which precluded that relation between a citizen and an alien not admitted to their sacred rites.

Like the civil and the Jewish laws, the canons distinguished

two degrees, — marriage proper, or that which was contracted *per verba de presenti*, and which established the relation of husband and wife from the instant the contract was made, and espousals, or an agreement to be married at a future day. Both of these contracts were recognized as sacred ordinances, though the latter was dissoluble by the agreement of both parties to it. But if not so dissolved, it could be enforced against the recusant by the decrees and censures of the court, — was effectual, so far as to invalidate an actual marriage contracted in derogation of it, and was perfected by cohabitation.

Marriage itself was, as has been said, indissoluble. The ecclesiastical court, however, assumed upon sufficient ground to decree a separation of the parties without the power to contract other relations. They also assumed to inquire whether a marriage, contracted in form and consummated by actual cohabitation, was in fact unlawful by reason of any impediments that existed at the time; and if so, to decree accordingly for the good of the souls of the parties. But a marriage of this description was valid until such decree, and could not after the death of the parties be so disturbed as to make the issue illegitimate. It was therefore only voidable, and not, as the second marriage in a case of bigamy, entirely void.

Upon the conversion of Constantine, the Empire became Christian; its tribunals ceased to be obnoxious to the faithful, and the Christian courts were no longer required for most of the uses for which they had been kept open. Still, however, they were retained, and a matter so peculiarly Christian in its origin and character as canonical marriage continued to be subject to their cognizance. They asserted jurisdiction in certain other matters. But these were matters of inferior importance, or else, as in the case of administration and probate of wills, their claim of jurisdiction was disallowed by the laws of the Empire.

Two centuries and a half of imperial protection and of secular honor had done somewhat to extend and consolidate the body of the Church, and the successors of the "fishers of men" spread their net for kings and kingdoms. Augustine and his associates, as ambassadors of the pontifical court, negotiated

with the Saxon kings of England their conversion to the Church and accession to the system of Europe. With the faith, they brought the learning, institutions, and jurisprudence of the Continent, to animate and adorn the bald and frigid organization of the Saxons. Those who carried thither the new order of things remained there to nurse it. The bishops, therefore, had seats assigned them in the Witenagemote, and assisted the earls to hold courts in the counties. Among the things thus introduced into Britain were tithes, and the observance of Sunday and the other solemn days of the Church. Wills and testaments, which, according to Tacitus, were unknown to the ancient Germans, and which, at the earliest day when we know them to have been in use in England, resembled those of the civil law, and were wholly free from the restraints of the feudal laws, were also probably introduced at this time; while to the already decorous nuptial regulations and practices derived from the Germans of Tacitus, were added the refinements which the canons had already established, and which have been adverted to.

William the Conqueror made numerous changes, and although the bishops retained their place in the House of Lords, they were severed from the county courts and restricted in their jurisdiction to special matters. Wills and testaments and the distribution of the goods of intestates were assigned to their jurisdiction, perhaps because the custom of testamentary bequest was brought by them into the realm, and this and cognate matters were governed consequently by the canonical rules derived from the civil law. For like reasons, they acquired cognizance of cases relating to sacred persons and things, and offences of a spiritual nature, or such as were supposed to affect the soul, to violate in a special manner or degree the conscience of the offender, and to outrage the Church. Persons embraced in the jurisdiction of the courts Christian, and therefore exempted from that of the king's court, were monks, nuns, and all the secular clergy; singers, or such as chanted the sacred ritual on solemn days; readers; door-keepers of the churches, exorcists, whose office it was, by solemn imprecations and the use of holy water, to drive away malignant spirits; acolytes, whose humble duty was

merely to furnish wax-lights for the altars; and grave-diggers. Against these, the process of the king's courts was ineffectual; for, upon claim made by the ordinary, they were always surrendered to him to be dealt with according to the laws of the Church. These courts had also exclusive jurisdiction over churches and cathedrals, monasteries and other religious houses, hospitals, chuchyards, and even fields distinguished by the crosses of knights templars. Into these sacred places the king's courts could not obtrude their process nor their officers, and the fugitive from secular justice was there safe. Marriage and its accessories, legitimacy, divorce, money due on marriage contracts, and espousals, were also included in the category of sacred things, and finally, all promises being binding upon the conscience, the offence of *lesio fidei* was dealt with for the good of the offender's soul. Tithes, first-fruits, and oblations belonged also to their jurisdiction. They took cognizance, too, of a large list of offences, such as blasphemy, idolatry, heresy, disturbance of divine worship, simony, perjury and subornation of perjury in an ecclesiastical court, dilapidations, and retaining money promised in commutation of corporal penance.

For the enforcement of their decrees, and for the punishment of offences, these courts had no power but by means of spiritual censure, excommunication, and the like, which indeed were ordinarily sufficient. But in the failure of these, there remained the writ of *significavit* issuing out of the king's court, on receiving which the sheriff took the hardy offender into custody, and held him till the Church was satisfied by his submission and penance.

The jurisdiction of the ecclesiastical courts and the immunity of things sacred, having attained their greatest extent in England about the time of Henry III., began to be gradually curtailed as the common law arose from its jejune and rudimental condition. The sanctuary which protected the fugitive from the harsh proceedings of the secular courts was unnecessary when these courts became competent themselves to throw around the accused the protection of the laws. Learning, that might have prejudiced its possessor before an unlettered forum, ceased to be pleadable to the jurisdiction, as the

judges became learned; and, in short, the refinements which the king's courts borrowed by degrees from the civil and canon laws enabled them, by like degrees, to assume and to discharge the functions which the ministers of those far more recondite and thorough systems of law were for a long period alone competent to discharge.

Two important subjects of jurisdiction, besides some of secondary consequence, were retained by the ecclesiastical tribunals, until the passage of the statutes that have been referred to, namely, marriage and its incidents, and the probate of wills and administration of estates; and it remains for us to resume the synopsis of the history of opinion and practice connected with the first-named of these subjects.

Originally, and until the time of Innocent III., near the close of the twelfth century, the Church appears to have prescribed no form or ceremony for contracting marriage. Its courts assumed to inquire whether the contract had been made, and if it had, they held the parties to the just and legal consequences of it. In England, it is said that "the man came to the house where the woman inhabited, and carried her with him to his house, and this was all the ceremony."* But a council in the pontificate of that Pope required that all marriages should be celebrated *in facie Ecclesiæ*, that is, in the presence of a person of the Church in holy orders. Marriages not so celebrated, however, were never for that cause held to be void by the English courts Christian, but were simply deemed irregular, and the parties were compelled by ecclesiastical censures to renew the contract before the priest. An irregular marriage, moreover, could never be admitted in proof as the foundation of a claim in those courts.

A question was much debated, whether an irregular marriage, not followed by cohabitation, should prevail as against a subsequent one contracted with a different party in presence of the Church, and consummated. A statute of Henry VIII. was passed for the purpose of giving effect to the latter; but this was repealed in the reign of his successor, in conformity with the doctrine of the ecclesiastical courts, and with the

* Viner's Abridgment: *Marriage.*

opinion of the best jurists. But the law of Henry VIII. prevailed until a recent day in Ireland, upholding the second marriage if followed by cohabitation, against the first, celebrated even *in facie Ecclesiæ.*

But the Council of Trent was never recognized by the king's courts in England, where the matter has always been considered independently of the decrees, and, with the exception of certain forms prescribed in a series of statutory provisions beginning with the act of 1752, remains as it was in ancient times. Consent constitutes the marriage, and may be proved like other facts. Thus dower and courtesy, with the other ordinary civil consequences, attached as well to the marriage of dissenters as to the regular ecclesiastical contract. The same is the case in Scotland, which country never adopted the decrees of the Council of Trent, and whose laws required no ceremony to confirm the contract of marriage.

In several of the States of the Union in which no statutes had been enacted to regulate the matter, the law has at different times been judicially declared in conformity with that of Scotland. The subject was lucidly discussed in an opinion pronounced by the late Judge Woodbury in the Superior Court of New Hampshire, in which it was held, that no intervention of priest or magistrate was required to render a marriage contract valid, and to endow the contract with its civil consequences. New Jersey, Connecticut, and probably other States, recognized the same general law. In Massachusetts, the several statutes which had been made from a very early period on the subject, and which will presently be referred to, were held to be not merely directory, and a marriage was decided to be invalid, though the *consensus et concubitus* were proved, there having been no magistrate or minister present and taking official cognizance of the contract.

During the period of the Commonwealth and the disorganization of the national Church, justices of the peace performed the marriage ceremony, and an act of Parliament after the Restoration confirmed the contracts so made. The Puritans in New England naturally adopted the radical principles that prevailed in England, and an ordinance was passed in 1646 which limited to magistrates, and to persons elected in

the towns for that purpose, the power of solemnizing marriages. This remained in force about fifty years, when another ordinance was enacted, extending that power to ministers of the Gospel. These ordinances were in substance re-enacted by the Legislature of Massachusetts in 1787.

Soon after this, the Quakers, who for nearly a century and a half had celebrated their marriages with the forms prescribed by their own faith, although not authorized, but actually forbidden by law, became alarmed by a question that arose as to their legal effect and validity. The possibility of their having been wholly void, which certainly derives countenance from a decision of the Supreme Court subsequently pronounced, and to which we have already adverted, was too serious, and an act of the Legislature was procured for their confirmation.

Espousals, as we have said, were a promise to marry at a future day, and never required any ceremony. They might be ratified, say the canons, by an oath, a pledge, a writing, or a kiss. The binding force of the engagement was recognized in an imperfect degree by the Jews and by the Romans, from whichsoever source the canons may have derived it. Joseph "had a mind to put away privily" Mary, to whom he was espoused; and the Roman gallant had only to send his sweetheart the short message, *Conditione tuâ non utor*, "I do not insist on your engagement," and it was at an end. But the Church, as has been said, held these engagements sacred, and would compel the parties, by the usual means, to keep them specifically. This power, as well as that of requiring the parties to celebrate or renew an actual marriage *in facie Ecclesiæ*, was taken away by the marriage act of 1752.

But the binding force of a mutual promise of marriage was recognized at an early day in the secular courts, and there is a case reported as early as the reign of Henry VII. "A woman in London had given to the plaintiff flattering words *equipollentia* to a promise of marriage; and by that means he had delivered to her money and other things; and she had caused the plaintiff to retain counsel for her, and to travel about her suits in chancery; and afterwards the woman refused to marry him, but married another." Suits of this kind seem, however, not to have been of familiar occurrence; for in 1698 a ques-

tion arose whether they could be maintained, since the parties had their remedy in the ecclesiastical courts. It is superfluous to say, that they have since been common both in England and in this country, and that juries are directed to take into view the fortune of the delinquent party in awarding damages.

The dogma of the canons which assigned to the marriage tie its character of indissolubleness for causes supervening after its formation, was extended in early times to the prohibition of second nuptials. But this was gradually relaxed or limited to special cases, though it had not so wholly disappeared in the reign of Edward VI. but that, in the scheme for the reformation of the canons proposed at that time, provision was expressly made for the allowance of second marriages. The same dogma rendered impossible the dissolution of the bond of matrimony for the criminal conduct of either party. But for unchaste or cruel behavior, rendering the cohabitation of the parties insufferable, the canons allowed only a qualified separation, called a divorce from bed and board, sending back the severed pair upon society in the anomalous condition of "a wife without a husband and a husband without a wife." Such was the nearly unvarying practice from the earliest times till the act of the present sovereign, during all which period no divorces were granted but by acts of Parliament for the cause of adultery, nor by Parliament even for the adultery of the husband.

It is remarkable that in the earliest legislation and practice in this country, and even in laws still in force in many cases, one or both of the divorced parties are precluded from marrying again; so thoroughly engrafted upon the minds of the Puritans and their descendants were these opinions.

In Scotland the law has long been otherwise; in the plan for the reformation sketched by Cranmer as the head of a commission created for that purpose in the reign of Edward VI., and which has already been referred to, it was provided that the crime that has been mentioned should constitute a cause of divorce *a vinculis;* and such is believed to be the law in all the States of the Union in which legislative provisions have been made.

During the first five hundred years of the Roman Commonwealth, it is said that there were no divorces, though the laws made provision for them. It is easy to infer from this tradition, that such occurrences were rare. It is certain that they became afterward extremely frequent. The tendency in the modern states of Europe has been, to relax the strictness of the canons in this particular, and in some this has been carried to an extent that has called forth very severe animadversions, as imperilling domestic security and faith, and indeed the entire social fabric. But in some of the United States, legislation has advanced almost as far in the same direction; and the principle seems to have prevailed, that a state of facts which affords ground to conclude that a marriage has ceased to yield to the parties and to society the benefits for which marriage is designed, constitutes a sufficient cause for dissolving it, and for permitting the parties to form new and more propitious connections if possible. It is not perhaps extravagant to say, that, in premising the various states of facts under this category, the lawgivers of our country have emulated the astuteness with which the canons sought, in the articles of affinity, spiritual cognation, precontract, and like prevenient causes, the means to annul connections which parties had felt to be intolerable, but which the theory of the law pronounced indissoluble.

Against this tendency here and abroad to mitigate the strict and ancient quality of the marriage bonds, sages have protested, as being the consequence of a relaxed morality, and as leading to further degeneracy. On the question thus raised, it would be unphilosophical at this day to form or to enforce opinions by reasoning *a priori*. From the facts to which we have adverted, it would seem that in the progress of civilization, whether Roman or modern, divorces have become by degrees of more and more frequent occurrence, and laws have, in both cases, yielded to the force of opinion, and have been so modified as to afford increased facilities for procuring them.

We think there may be room for doubting whether this sign or concomitant of refinement in manners should necessarily be set down to the account of degeneracy in morals.

The materials for the history of domestic manners, which are of course more scanty as we recede into the less refined epochs, will hardly authorize us to decide whether the grievances and scandals then submitted to by parties indissolubly joined were greater or less than those which, in later periods, have demanded a relaxation of the marriage tie; and whether a state of things for which, in the advanced phase of civilization, society has demanded and obtained a remedy, in the earlier, being deemed remediless, produced the ordinary evils of despair.

We are too much accustomed in this country to regard laws as the fruits of opinion and of the public morals, — to attach very great consequence to them as affecting either the one or the other.

> "The real hardened wicked
> Wha hae na check but human law,
> Are to the few restrictet";

and in a like proportion are those who are actually affected by the laws in question, or indeed by any laws formed for the enforcement of personal morality or the protection of public decorum. Upon the enactment of a new law, adapted to the relief of a class of conjugal infelicities, a fresh crop of divorce cases appears in our courts; but we think that no attempt has been made, with even partial success, to show that these laws, even when carried to the utmost extreme of latitude yet attained, have perceptibly affected the aspect of society. Divorces are still rare, even where least infrequent.

A series of acts of Parliament of the 20th and 21st of the present Queen had for one object the taking away from the ecclesiastical courts all their jurisdiction in cases matrimonial, testamentary, and concerning the administration of the effects of intestates, and to vest that jurisdiction in lay tribunals constituted by law for that purpose. Thus the Church parted with the much diminished remnant of an office strictly secular in its nature, which it had held since the Saxon conversion. But this was practically of no further importance, than to transfer from the Church to the Crown the appointment of the judges clothed with the jurisdiction;

for the bishops themselves had little to do with the business of their courts, which has been for many years transacted by their officials or delegates, — using each of these terms with a meaning somewhat broader than the technical one.

A more important object was to empower certain of the newly created tribunals to decree a judicial separation at the instance either of the husband or the wife. This decree may be obtained for the cause of adultery, cruelty, or two years' desertion. It restores the wife, in general, to the civil capacities and rights of a single woman, but does not allow either party to contract another marriage. The act provides also for the dissolution of the bonds of matrimony at the instance of the husband, upon proof of simple adultery; or upon the wife's petition, on the proof of adultery accompanied with such cruelty as would of itself furnish ground for a judicial separation, or accompanied with bigamy or incest. In case of the husband's petition, the adulterer may be made a party; and the action of *crim. con.* is abolished; for this party may be required by the proceeding to pay costs and damages. For a dissolution of the marriage, setting the parties wholly free, application must be made to a court comprising some of the principal law dignitaries of the kingdom; but a judge of assize may hear and determine an application for a judicial separation. The act contains also a provision, by which a wife who has been deserted by her husband may obtain the control of property subsequently accruing to her by her own industry or otherwise, so that neither the husband nor his creditors can appropriate it.

In conformity with the established usage of Parliament to grant divorces only upon the application of the husband, this act, it will be seen, distinguishes the adultery of the wife, which is made a sufficient cause for a dissolution of the marriage, from that of the husband, which furnishes ground for a judicial separation only, unless accompanied with facts that give peculiar aggravation to the offence. Opinions have been expressed by many writers, and by Dr. Johnson in conversations detailed by his biographer, which give countenance to this distinction. It is one, however, not generally recognized or regarded in the legislation of these States, which, we

believe, uniformly attaches the same consequences to the offence, whether committed by the husband or the wife.

These acts were passed in the midst of a good deal of discussion both in and out of Parliament, upon the various subjects embraced in their purview. In particular, the provision which they make for the protection of the acquisitions of married women was framed with reference to exigencies of a distressing character then brought prominently into notice, and which were supposed to demand a much greater relaxation of the rule of the common law merging in the husband the civil being of the wife, with all her chattels and the usufruct of her lands. The statute has, however, stopped far short of disturbing that rule, which some of the admirers of the common law point out as one of the safeguards of domestic purity, harmony, and order, and which they boast has preserved English society at an elevation very far above that of the Continent, where the principles of the civil law prevail, keeping the property of the husband and of the wife distinct, admitting possible conflict of interests between parties who should have but one interest, and affording her who has devoted herself to obedience facilities unknown to the severe usages of England for escaping from her state of subordination, and indeed for dictating terms. The statute has in this respect stopped far in the rear of points attained, in the course of reform, by some of the legislatures of these States, where more constant and violent fluctuations in property and business than prevail in the old countries have been supposed to create the need of further legal protection to the fortunes of married women than formerly existed.